BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

Petition for Declaratory Ruling Pursuant to Section 1.2(a) of The Commission's Rules	WC Docket No. 14-52

COMMENTS OF BRIGHT HOUSE NETWORKS, LLC, CEQUEL COMMUNICATIONS, LLC d/b/a SUDDENLINK COMMUNICATIONS, AND CHARTER COMMUNICATIONS, INC.

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I. INTRODUCTION

Bright House Networks, LLC ("BHN"), Cequel Communications, LLC, d/b/a Suddenlink Communications ("Suddenlink") and Charter Communications, Inc. ("Charter"), (collectively "the Cable Companies"), hereby submit these Comments in response to the Wireline Competition Bureau's April 8, 2014 public notice[1] seeking comments on Mediacom Communications Corporation's ("Mediacom") Petition for Declaratory Ruling ("Petition").[2] Mediacom requests the Federal Communications Commission ("Commission") declare that it is not just and reasonable for utilities to impose "asymmetric and non-reciprocal indemnification liability for negligence"[3] clauses in pole attachment agreements under section 224 of the Communications Act of 1934, as amended (hereinafter "the Pole Attachment Act").

BHN, Charter and Suddenlink are, respectively, the nation's sixth, fourth and seventh largest cable operators, with approximately 10 million residential and business customers among them. Together the Cable Companies are attached to hundreds of thousands of poles nationwide, the bulk of which are regulated by the Commission. The Cable Companies support Mediacom's Petition to reaffirm the Commission's longstanding rule, first articulated in *Cable Television Ass'n of Georgia v. Georgia Power Co.*, that nonreciprocal indemnity clauses in pole attachment agreements are unreasonable.[4] The Cable Companies rely on the *Georgia Power* case to ensure just and reasonable pole attachment agreements. Reciprocal indemnity in pole attachment agreements is not only eminently reasonable, but also promotes the purposes of the Pole Attachment Act, including cost-effective and efficient broadband deployment.

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[1] Public Notice, WC Docket No. 14-52 (rel. Apr. 8, 2014).
[2] Mediacom Communications Corp. Petition for Declaratory Ruling, WC Docket 14-52 (filed Feb. 19, 2014) (hereinafter "Petition").
[3] *Id.* at 1.
[4] *Cable Television Ass'n of Georgia v. Georgia Power Co.*, Order, 18 FCC Rcd 16333, ¶ 31 (Enf. Bur. 2003), *recon. denied*, 18 FCC Rcd 22287 (Enf. Bur. 2003) (hereinafter "*Georgia Power*").

II. RECIPROCAL INDEMNITY PROMOTES THE PURPOSES OF THE POLE ATTACHMENT ACT

A. Attachers Rely on the *Georgia Power* Case to Ensure Just and Reasonable Indemnity Provisions Despite Utilities' Superior Bargaining Position

Congress enacted the Pole Attachment Act in 1978 to "minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public." S. Rep. No. 95-580 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 122. Congress recognized that due to their exclusive control over essential pole facilities utilities enjoy superior bargaining power "over cable operators in negotiating the rates, terms and conditions for pole attachments." *Id.* at 121. Congress directed the Commission to ensure that the rates, terms and conditions of pole attachments are just and reasonable notwithstanding utilities' "inherently superior bargaining position."[5]

When the Enforcement Bureau rejected Georgia Power's unsupported allegation that "because of mandatory access, a non-reciprocal indemnification provision is warranted given that the Cable Operators . . . pose a 'far greater, and unwanted, risk' to Georgia Power in the pole attachment process,"[6] it was carrying out the Commission's Congressional mandate. Rather than allow Georgia Power to impose an unbalanced indemnity clause that would shift unreasonable risk to the attachers, the Bureau opined that "[a] reciprocal indemnification provision . . . simply would result in each party assuming responsibility for losses occasioned by its own misconduct," and that there is no "rational basis to support" nonreciprocal clauses.[7]

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[5] *Selkirk Commc'ns, Inc. v. Florida Power & Light Co.*, Order, 8 FCC Rcd. 387, ¶ 17 (1993) (internal citations omitted).

[6] *Georgia Power*, 18 FCC Rcd 16333, ¶ 31.

[7] *Id.* Some certified states have also addressed this issue. *See, e.g.*, 83 Ill. Adm. Code 315.60 ("CATV operators cannot be required in any pole attachment agreements to indemnify the electric utilities or telecommunications carriers from the negligence of electric utilities or telecommunications carriers."); *see also* Admin. Case No. 251, *The Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments* (Ky. PSC Aug 12, 1982) (finding "excessive" and rejecting "hold harmless clauses" in pole attachment agreements requiring cable operators to maintain insurance against the liability of the utility).

Nothing has changed since *Georgia Power* was decided in August 2003. In upholding the sign and sue rule during its most recent rulemaking, the Commission emphasized that "[t]he record [in the rulemaking] does not demonstrate that the potential for utilities to exert such coercive pressure in pole attachment agreement negotiations is less significant today than when the Commission first adopted the sign and sue rule."[8] No attacher should be forced to accept responsibility for the negligent actions of a pole owner, which is the unjust and unreasonable position that Mediacom finds itself in today.

Indeed, the *Georgia Power* holding on reciprocal indemnity has served as a critical tool in achieving more reasonable and balanced pole attachment agreements. Since *Georgia Power* was decided, the Cable Companies have relied on the holding in pole attachment agreement negotiations for the proposition that indemnity and liability provisions in pole attachment agreements must be reciprocal. Some utilities "misstate the holding of *Georgia Power*," as Mediacom indicated, "resulting in unnecessary haggling over what really should be a settled issue."[9] But in the Cable Companies' experience, many utilities appear to recognize that *Georgia Power* is precedent and that the Commission would not uphold an indemnity clause that shifted responsibility for a utility's actions onto an attacher. To the extent a utility has insisted on less than reciprocal indemnity or any clause that shifts liability unreasonably to the attacher, those clauses should be unenforceable as a result of *Georgia Power*.

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[8] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, ¶ 104 (2010).
[9] Petition at 5.

B. The Holding in *Georgia Power* Promotes More Efficient, Effective and Predictable Pole Attachment Agreement Negotiations and Thus Reduces the Unnecessary Delays and Costs Often Associated with Broadband Deployment

As the Commission recognized in its most recent rulemaking, the pole attachment negotiation process can be "prolonged, unpredictable, and costly."[10] Moreover, "to the extent that access to poles is more burdensome or expensive than necessary, it creates a significant obstacle to making service available and affordable."[11] Just as the Commission's new "specific" timeline for access was designed "to eliminate unnecessary costs or burdens associated with pole attachments," having specific rules governing what is and is not an acceptable pole attachment agreement term reduces the time and cost associated with pole attachment agreement negotiations, which also leads to more cost effective and efficient broadband deployment.[12]

Most pole attachment agreements presented to the Cable Companies today contain various indemnity/liability provisions. In addition to general indemnity/liability clauses, modern pole attachment agreement templates can include specific indemnity/liability provisions associated with (i) rights-of-way and easements; (ii) facility repairs; (iii) environmental waste and contaminants; (iv) engineering decisions; (v) climbing poles; (vi) contractor supervision, *inter alia*. Being able to rely on the *Georgia Power* reciprocal liability and indemnity holding to ensure reasonable provisions saves time and money during negotiations and thus "mak[es] [broadband] service more available and affordable."[13] To the extent a utility refuses to negotiate terms consistent with *Georgia Power*, the Cable Companies consider those terms unenforceable

[10] *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC 5240, ¶ 6 (2011) ("2011 Pole Order).
[11] *Id.*
[12] Indeed, the Commission recognizes that it is helpful for parties to have some ground rules "upon which . . . to implement pro-competitive attachment policies and procedures through arms-length negotiations, rather than having to rely on multiple adjudications by the Commission in response to complaints or by other forums." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC 15499, ¶ 1159 (1996).
[13] 2011 Pole Order, 26 FCC 5240, ¶ 6.

(unless there is an actual bargained-for exchange) and may decide not to waste additional time and money trying to convince the utility to make the provisions reciprocal and balanced.

C. Reciprocal Indemnity Ensures Utilities Do Not Double-Recover for Expenses Reimbursed Through the Rental Fee

The Commission has always "looked closely at make ready inspection and other charges to ensure that there is no double recovery by the utilities for expenses for which they will be or have already been reimbursed through the annual pole rental fee."[14] In the *Georgia Power* case, for instance, the Enforcement Bureau ruled that a provision requiring the Cable Companies to pay Georgia Power's "fees for outside counsel and allocated costs of inside counsel" incurred in relation to the pole attachment agreement, among other costs and expenses associated with administering the agreement, was unreasonable.[15] In rejecting the provision, the Enforcement Bureau explained that:

> [t]hrough the annual rate derived by the Commission's formula, an attacher pays a portion of the total plant administrative costs incurred by a utility. Included in the total plant administrative expenses is a panoply of accounts that covers a broad spectrum of expenses. A utility would doubly recover if it were allowed to receive a proportionate share of these expenses based on the fully-allocated costs formula and additional amounts for administrative expenses. The allocated portion of administrative expenses covers any routine administrative costs associated with pole attachments, such as billing and legal costs associated with administering the agreement.

Id. ¶ 18.

These administrative FERC accounts include expenses related to liability and indemnity, including: (a) "payment of court costs, witness fees and other expenses of legal department," (b) "fees and expenses of professional consultants," such as outside attorneys (c) "property insurance," (d) personal "injuries and damages," including those not covered by insurance and

[14] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd 4387, ¶ 44 (1987).
[15] *Georgia Power*, 18 FCC Rcd 16333, ¶¶ 17, 18 & nn. 63-64 (citing the administrative Federal Energy Regulatory Commission ("FERC") accounts that factor into the administrative portion of the carrying charges).

(e) "employee pensions and benefits," including "payments for accident, sickness, hospital, and death benefits and insurance."[16] Reciprocal indemnity and liability provisions in pole attachment agreements therefore ensure there is no double recovery for expenses that are reimbursed through the annual rental rate.

IV. CONCLUSION

For the foregoing reasons, the Commission should reaffirm its holding in *Georgia Power* that nonreciprocal indemnity for negligence in pole attachment agreements is unjust and unreasonable and grant Mediacom's Petition.

Respectfully submitted,

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[16] *See* 18 C.F.R. pt. 101 Accounts 921, 923-926.